

## BOOK REVIEW

RACE, RACISM AND AMERICAN LAW. By DERRICK A. BELL, JR. Boston: Little, Brown & Co., 1973. Pp. xlii, 1076. \$19.00.\*

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[Can] American justice, American liberty, American civilization, American law, and American Christianity . . . be made to include and protect alike and forever all American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the land?<sup>1</sup>

Almost a century ago the distinguished abolitionist and statesman Frederick Douglass,<sup>2</sup> born a slave, pondered whether blacks would be full and equal participants in the American dream and asked the above question. Despite the millions of words espoused by lawyers, by lawyer-politicians, and sometimes even by law professors proclaiming the progress of American law, among many there still persists the nagging doubt whether legally sanctioned racism<sup>3</sup> of the past<sup>4</sup> and its present impact will

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\* This essay started out as a traditional book review. As I read Professor Bell's excellent treatise *RACE, RACISM AND AMERICAN LAW* (1973), I kept wondering why law professors have not published similar casebooks before. Accordingly, this essay is designed to serve the dual purpose of reviewing Bell's work and exploring the relevance of racism and the American legal process as a discipline for study by lawyers and law students. In these days of full disclosure, it should be indicated that I do not speak from a "neutral stance," if such exists. For the last three years I have taught Racism and the Early American Legal Process at the Graduate School of the University of Pennsylvania and at the University of Pennsylvania Law School. I have developed this theme at greater length in HIGGINBOTHAM & RIGNEY, *RACE AND THE LEGAL PROCESS IN THE UNITED STATES*, ch. I-XIII (unpublished monograph), and in chapters in the following works: *Is Yesterday's Racism Relevant to Today's Corrections?* in *LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, OUTSIDE LOOKING IN* 1-21 (1970); *Law Enforcement and Justice*, in *NATIONAL SECURITY MANAGEMENT—NATIONAL URBAN PROBLEMS*, ch. 8 (H. Yoshpe and F. Burdette eds. 1970); *The Black Prisoner: America's Caged Canary*, in *VIOLENCE, THE CRISIS OF AMERICAN CONFIDENCE*, ch. 7 (H. Graham ed. 1971).

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<sup>1</sup> R. LOGAN, *THE BETRAYAL OF THE NEGRO* 9-10 (1965) (quoting Frederick Douglass). According to Frederic Holland, Douglass' statement was, "The real question, the all-commanding question, is whether American justice, American liberty, American civilization, American law, and American Christianity can be made to include and protect alike and forever all American citizens." F. HOLLAND, *FREDERICK DOUGLASS* 375 (1891).

<sup>2</sup> For a superb collection of Douglass' papers, see F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* (rev. ed. 1893); P. FONER, *FREDERICK DOUGLASS* (1964); P. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* (1950-55).

<sup>3</sup> For a definition of racism, I accept the analysis of A. DOWNS, *RACISM IN AMERICA, AND HOW TO COMBAT IT*, in *URBAN PROBLEMS AND PROSPECTS* 77 (1970) (emphasis added):

be eradicated<sup>5</sup> in this decade or even in this century. Did the nation reach its highest plateau of racial options and understanding in the late 1960's? Will future improvements be miniscule at

Perhaps the best definition of *racism* is an operational one. This means it must be based upon the way people actually behave, rather than upon logical consistency or purely scientific ideas. Therefore racism may be viewed as any attitude, action or institutional structure which subordinates a person or group because of his or their color. Even though "race" and "color" refer to two different kinds of human characteristics, in America it is the visibility of skin color—and of other physical traits associated with particular color or groups—that marks individuals as "targets" for subordination by members of the white majority.

See also G. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND* xi (1971):

[Racism is] synonymous with race prejudice and discrimination, but . . . might be considered preracist or protoracist, if one defines racism in a more restricted way—as a rationalized pseudoscientific theory positing the innate and permanent inferiority of nonwhites. Racism in this second sense had some roots in the biological thinking of the eighteenth century but did not come to fruition or exert great influence until well along in the nineteenth.

<sup>4</sup> For an analysis of early practices, see Higginbotham, *Racism and the Early American Legal Process, 1619-1896*, 407 ANNALS 1 (1973). Also see the pioneer work of Mary Frances Berry, *BLACK RESISTANCE/WHITE LAW* (1971). For general background, see R. BARDOLPH, *THE CIVIL RIGHTS RECORD* (1970); J. BLASSINGAME, *BLACK NEW ORLEANS* (1973); J. BLASSINGAME, *THE SLAVE COMMUNITY* (1972); S. ELKINS, *SLAVERY* (1959); J.H. FRANKLIN, *FROM SLAVERY TO FREEDOM* (3d ed. 1967); G. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* (1971); L. GREEN, *THE NEGRO IN COLONIAL NEW ENGLAND* (1942); W. JORDAN, *WHITE OVER BLACK* (1968); G. MYRDAL, *AN AMERICAN DILEMMA* (1944); B. QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* (rev. ed. 1969); K. STAMPP, *THE PECULIAR INSTITUTION* (1956); C. WOODSON & C. WESLEY, *THE NEGRO IN OUR HISTORY* (11th ed. 1966); C.V. WOODWARD, *ORIGINS OF THE NEW SOUTH* (1951); C.V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d rev. ed. 1966). For the best bibliography, see A. HORNSBY, *THE BLACK ALMANAC* 169 (1972). For an anthology, see *CIVIL RIGHTS AND THE AMERICAN NEGRO* (A. Blaustein & R. Zangrado eds. 1968).

<sup>5</sup> See Burns, *Black People and the Tyranny of American Law*, 407 ANNALS 156, 160 (1973):

The numerous successful legal attacks upon segregation have not solved the problem of racism and the law for black people today. Racism is still part and parcel of the daily reality of the functioning of the justice system. Blacks are still subjected to the overtly racist attitudes, actions, and comments of an overwhelmingly white justice system. Black people are likewise affronted by a legal system that so often works against them and too seldom works for them.

In 1967, the United States Commission on Civil Rights concluded:

What is not visible to the eye and what apparently is not generally understood is the feeling of many Negro ghetto residents that they live in a "trap" from which they cannot escape. The life of the slum dweller—physically bare—is characterized by frustration, despair and hopelessness. He has a sense of powerlessness and a feeling of inability to communicate his own problems, control his own destiny or influence persons in positions of authority.

It would be reassuring to conclude that the situation of Negroes in the slums is not dissimilar to that of past generations of American immigrants who lived in ghettos but were able to leave. Many white Americans have drawn this conclusion and have expressed the belief that Negroes themselves are responsible for their condition and that all that is required to escape is personal effort. But the analogy is misleading and dangerous. Negroes are not recent immigrants to our shores but Americans of long standing. They were oppressed not by foreign governments but by a system of slavery supported by this government and its people. The legacy of slavery continues in the form of racial segregation (*de facto* is no longer legal), discrimination and prejudice. Escape from the ghetto for any group is much more difficult in the America of the 1960's than it was one or two generations ago. Society has become more complex, and unskilled employment or small business enterprises no longer are meaningful first steps up the ladder.

UNITED STATES COMMISSION ON CIVIL RIGHTS, *A TIME TO LISTEN . . . A TIME TO ACT* 89-90 (1967).

best, or will the progress of the 1960's suffer a steady erosion? Professor Derrick Bell's monumental casebook, *Race, Racism and American Law*,<sup>6</sup> provides keen insights into the legal past, its impact on the present, and the legal options for diminution of racism in the future.

Professor Bell's is the first major casebook<sup>7</sup> which, even as its title makes clear, basically and almost exclusively focuses on racism as a specific past and present pathology in the American legal process. While racism could theoretically include discrimination against any person or racial group, white or black or any hue in between, Professor Bell's book is primarily "concerned with American racism initiated by whites against blacks, and seeks to determine to what extent that racism is reflected in the law."<sup>8</sup> However, his book is not limited solely to blacks. He has one chapter concerning racism against other non-whites, with particular commentary on the problems of Indians, Chinese, Japanese, and Mexicans, and on racism in other countries. Though some authors have dealt with racism (often tangentially) under the umbrellas of constitutional law, civil liberties, or civil rights, Bell's book is the first since the pioneer work of Professors Thomas Emerson and David Haber<sup>9</sup> which offers a truly comprehensive coverage of the matrices of racism and law.<sup>10</sup>

# I. WHY SHOULD RACISM BE STUDIED IN LAW SCHOOL?

Many Americans still find it too traumatic to study the true story of racism as it has existed in this country under the "rule of law." For many, the primary conclusion of the National Commission on Civil Disorders is too painful to hear:

What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.<sup>11</sup>

<sup>6</sup> D. BELL, *RACE, RACISM AND AMERICAN LAW* (1973) [hereinafter cited as BELL].

<sup>7</sup> Of course, there are general historical works which covered this field in a non-casebook fashion. See note 4 *supra*.

<sup>8</sup> BELL, *supra* note 6, at xxxix.

<sup>9</sup> *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (T. Emerson & D. Haber eds. 1952). Norman Dorsen joined Emerson and Haber in editing later versions of the book. *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (student ed. T. Emerson, D. Haber & N. Dorsen 1967) [hereinafter cited as *POLITICAL AND CIVIL RIGHTS*]. Professor Bell acknowledges the debt we all owe Emerson, Haber and Dorsen. BELL, *supra* note 6, at xl.

<sup>10</sup> H. HOROWITZ & K. KARST, *LAW, LAWYERS AND SOCIAL CHANGE* (1969), deals with cases and materials on slavery, racial segregation and inequality of educational opportunity. While a solid piece of scholarship, its weaknesses are that exclusive of the early historical period, it is limited to the field of education, and it is not sufficiently current because it was published five years ago. There are also other books specifically directed to civil rights issues. See, e.g., *THE BILL OF RIGHTS READER* (4th ed. M. Konvitz 1968).

<sup>11</sup> NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 1 (1968).

This conclusion of the Commission was more often than not sidestepped by the early American constitutional law books. Yet the failure of renowned legal scholars to probe these racial issues adequately over the last several decades may be a partial cause of our present inability or tardiness in correcting the sequelae of yesterday's and even today's brutal racial injustices. Law cannot be taught in a valueless vacuum. By the very process of selecting which cases their students will read and discuss in class, professors help shape the horizons of future lawyers, judges, presidents and other public officials. While many view law school solely as a training ground for practicing lawyers, the consequence of legal training is far greater. We should not be unmindful that, as Professors Eulau and Sprague have said, lawyers have become the "high priests of politics."<sup>12</sup> Of the fifty-two signers of the Declaration of Independence, twenty-five were lawyers, as were thirty-one of the fifty-six members of the Continental Congress. Of the thirty-seven American presidents, twenty-four have been lawyers.<sup>13</sup> Between 1877 and 1934, seventy percent of American presidents, vice-presidents and cabinet members were lawyers.<sup>14</sup> Some have thought that there is an "overrepresentation of the legal profession compared with other occupations."<sup>15</sup> Governor Herbert Lehman once said that there is a "conspiracy of lawyer legislators to perpetrate for their profession the obstructions to justice by which it prospers."<sup>16</sup> Woodrow Wilson once commented, "The profession I chose was politics; the profession I entered was the law. I entered one because I thought it would lead to the other."<sup>17</sup> I have often wondered about the significance of the fact that the three presidents (Truman, Kennedy and Johnson) who in my lifetime have

<sup>12</sup> H. EULAU & J. SPRAGUE, *LAWYERS IN POLITICS* 11-30 (1964).

<sup>13</sup> *Id.* 11. See also D. MATTHEWS, *THE SOCIAL BACKGROUND OF POLITICAL DECISION MAKERS* 30 (1954).

<sup>14</sup> H. EULAU & J. SPRAGUE, *supra* note 12, at 11.

Of a total of 995 elected governors in all American states between 1870 and 1950, 46 percent were practicing lawyers.

In the legislative branches, the ascendancy of the legal profession is equally marked. Of 175 members serving in the Senate of the United States between 1947 and 1957, 54 per cent were lawyers. In the seventy-first through the seventy-fifth Congresses, from 61 to 76 per cent of the members of the Senate and from 56 to 65 per cent of the members of the House of Representatives belonged to the legal profession.

A survey of all 7,475 American state legislators serving in 1949 showed that 22 per cent were lawyers. About 30 per cent of the members of the Wisconsin legislature in 1957 were attorneys, as were 25 per cent of those serving in the Indiana General Assembly in 1959. In the four legislatures of New Jersey, Ohio, Tennessee, and California in 1957—where the data for the present study were collected—52, 36, 30, and 30 per cent of the members, respectively, were lawyers.

*Id.* 11-12 (footnotes omitted).

<sup>15</sup> *Id.* 18.

<sup>16</sup> *Id.* 20.

<sup>17</sup> *Id.* 1.

provided the most significant leadership in giving blacks fuller options were *not* lawyers.

No one has spoken over the years with greater clarity about the transmission of basic goal values in law school than Professor Myres S. McDougal.<sup>18</sup> Only recently he reminded law schools:

[Transmitting goal values] is a step you cannot avoid even if you wish to. The position that Professor Lasswell and I took many years ago was that while all law is policy, not all policy is law. All law, in the sense that it affects a distribution of values among people in a community, is policy; some policy is, however, naked power. *Whether we like it or not, law schools, lawyers, government officials, all of us, are working with values all the time.* The only question is how consciously, how deliberately, and how systematically we formulate and clarify these values.<sup>19</sup>

Of course, I am not suggesting that constitutional law professors should seek to galvanize students to any ideology. Rather, the obligation is to present to students the fullest spectrum of views. An analysis of past constitutional law casebooks is relevant if it indicates that, from a racial perspective, the full spectrum of issues has often not been presented. This exposure of views is particularly essential in the field of constitutional law. For, as we know, "[d]ue process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."<sup>20</sup> Justice Cardozo has defined due process as "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>21</sup> If key race relations opinions, majority or dissenting, are excluded from casebooks, students may be denied an exposure to important perspectives or values. When concepts or cases of critical historical significance are excluded from the casebook, the student is left to drift on his own.

Recently, the University of Washington Law School adopted an admission policy designed "to increase participation within the legal profession by persons from racial and ethnic groups [black Americans, Chicano Americans, American Indians, and Philippine Americans] which have been historically denied access

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<sup>18</sup> Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345-55 (1947).

<sup>19</sup> McDougal, *Beware the Squid Function*, 1 LEARNING AND THE LAW 16, 17 (1974) (emphasis added).

<sup>20</sup> *Hannah v. Larche*, 363 U.S. 420, 422 (1960) (Warren, C.J.) (dictum).

<sup>21</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

to the profession and which consequently are grossly under-represented within the legal system."<sup>22</sup> To this latter policy, Chief Justice Hale, of the Washington Supreme Court, vigorously dissented and responded by saying "preferential" policy "confesses to prior racial discrimination *which I doubt existed*."<sup>23</sup> While certainly reasonable persons might disagree as to the merits of such preferential policies, certainly no person, even one with meager historical information, should doubt that there has been prior racial discrimination.<sup>24</sup> Yet some lawyers and even judges, probably because of their isolation or their lack of information, are oblivious to the historical effects of past racial discrimination. Thus, one of the values of Professor Bell's book is that it gives some, but probably not enough, of the history of past racial deprivations so that today's problems can be understood in an appropriate legal and historical context.

## II. THE RELEVANCE OF *Dred Scott v. Sandford*<sup>25</sup>

Nowhere is the floundering or the reluctance of earlier constitutional law scholars to deal with racism more evident than in their almost total inattention to the *Dred Scott* case and other cases pertaining to slavery and the early postbellum civil rights decisions. I have often wondered why it was not until a decade after my 1952 graduation from Yale Law School that I first read any major portion of the *Dred Scott* case, and even worse, that I had never been aware of the powerful dissents of Justices McLean and Curtis.

In chapter one, Professor Bell uses *Dred Scott v. Sandford* as his first major case. He has adroitly excerpted the 337 page opinion to nineteen pages of text.

<sup>22</sup> *De Funis v. Odegaard*, 507 P.2d 1169, 1175, *cert. granted*, 94 S. Ct. 538 (1973).

<sup>23</sup> *Id.* at 1189 (emphasis added). There is substantial debate whether the University of Washington's policy was truly preferential, since the Law School Admission Test and grade data may not be the most accurate measure of one's potential either at law school or in the profession. See Brief for Harvard University as Amicus Curiae; brief for National Conference of Black Lawyers; brief for National Council of Jewish Women and other organizations as Amicus Curiae, *De Funis v. Odegaard*, 94 S. Ct. 538, *granting cert.* to 82 Wash. 2d 11, 507 P.2d 1169 (1973). See also Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*: *De Funis v. Odegaard*, 49 WASH. L. REV. 1 (1973); Comer & Coleman, *Quotas, Race and Justice*, N.Y. Times, Mar. 17, 1974, § 4, at 15, col. 5.

<sup>24</sup> For works concerning the past history of racial discrimination see note 4, *supra*. With regard to the legal profession, see Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069; Leonard, 407 ANNALS 134 (1973); Shuman, *Black Lawyers Study*, 16 HOWARD L.J. 225 (1971); Tollett, *Black Lawyers, Their Education and the Black Community*, 17 HOWARD L.J. 326 (1972).

<sup>25</sup> 60 U.S. (19 How.) 393 (1857). For a detailed analysis of *Dred Scott*, see Higginbotham and Rigney, *supra* asterisk note, ch. XII. See also V. HOPKINS, *THE DRED SCOTT CASE* (1951); L. MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 62-81 (1966); 3 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 1 (1922).

It was in *Dred Scott* that Chief Justice Taney, for the Court, held that under the Constitution a black man

*had no rights which the white man was bound to respect; . . . the [N]egro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.*<sup>26</sup>

Thus, with a sweep of his pen, the Chief Justice destroyed all hopes that blacks, whether "free" or slave, had of gaining access to the federal courts or the federal government for even the slightest protection of some human rights. The doors to the federal courts, the executive<sup>27</sup> and the Congress<sup>28</sup> were slammed shut.

#### A. *The Universal View?*

Chief Justice Taney's opinion knowingly contained numerous historical inaccuracies which were willfully slanted against blacks. For example, the belief at the time of the constitutional convention that "a black man had no rights which the white man was bound to respect" was hardly "universal." As early as February 18, 1688, the Mennonites in Germantown, Pennsylvania, had passed a highly popularized and vigorous resolution against the institution of slavery.<sup>29</sup> In 1772, before our revolution, Lord Mansfield stated from the Kings Bench:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.<sup>30</sup>

<sup>26</sup> 60 U.S. (19 How.) at 407 (emphasis added).

<sup>27</sup> For a discussion of the limitations which the President and others had placed on giving blacks full options, see N. WEYL & W. MARINA, *AMERICAN STATESMEN ON SLAVERY AND THE NEGRO* (1971). For an interesting analysis of a later era, see G. SINKLER, *THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS, FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT* (1972).

<sup>28</sup> On February 11, 1837, the House of Representatives resolved, by a vote of 162-18, that "slaves do not possess the right of petition secured to the people of the United States by the Constitution." W. GOODSELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 37 (rev. ed. 1968).

<sup>29</sup> See H.S. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 37-38 (8th ed. 1968); M.S. LOCKE, *ANTI-SLAVERY IN AMERICA, 1619-1808* (Johnson Reprint 1969).

<sup>30</sup> *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (K.B. 1772). For an excellent analysis

When reflecting on this country's tolerance of slavery, Thomas Jefferson observed, "Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."<sup>31</sup> In fact, slavery had been effectively abolished prior to our constitutional convention by the Massachusetts Supreme Court in the Quock Walker Cases,<sup>32</sup> and legislative action had been taken in other states.<sup>33</sup>

As Professor Louis Pollak has noted, Thomas Jefferson had written a clause in his July 2, 1776 draft of the Declaration of Independence, later to be withdrawn at the insistence of delegates from Georgia and South Carolina, "reprobating the enslaving of the inhabitants of Africa."<sup>34</sup> Thus, part of the tragedy of *Dred Scott* is that the court reached a constitutional holding mutilating the options of blacks while relying partially on inaccurate historical data known by the Court to be false.

### B. *The Racist Significance of Dred Scott v. Sandford*

The *Dred Scott* holding was unquestionably racist.<sup>35</sup> Chief Justice Taney's opinion constitutionally doomed only blacks to the status of mere property, whether they were born in this country or not, whether they were "free" or slave. The forceful dissents by Justices McLean and Curtis<sup>36</sup> emphasized that "[a] slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."<sup>37</sup> However, the dissenters could not

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of the *Somerset* case and Lord Mansfield, see J. Tombs, *Lord Mansfield*, 1973 (unpublished monograph, University of Pennsylvania Department of Sociology).

<sup>31</sup> T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 156 (1954). Jefferson further observed that the parents' involvement in slavery makes an impact on the white child, developing "the worst of passions, and thus nursed, educated, and daily exercised in tyranny, [the child] cannot but be stamped by it with odious peculiarities. The man must be a prodigy who can retain his manners and morals undepraved by such circumstances." *Id.* 155. When empathizing with the slave, Jefferson said:

For if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labor for another; in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavors to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him.

*Id.*

<sup>32</sup> The *Quock Walker* cases are a series of related cases centering upon the beating of a slave, Quock Walker, by his master, Jennison, in the early 1780's. The cases are described in Higginbotham & Rigney, *supra* asterisk note, ch. V (citing *Quock Walker v. Jennison*, 13 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, 1873-75, at 296 (1st Series, 1875); *Jennison v. Caldwell, id.*; *Commonwealth v. Jennison, id.* 293). The same cases are cited in 4 H. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 479-80 (reprint 1968). See also L. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* (1942); D. ROBINSON, *SLAVERY AND THE STRUCTURE OF AMERICAN POLITICS* 24-29 (1971).

<sup>33</sup> See D. ROBINSON, *supra* note 32, at 29.

<sup>34</sup> THE CONSTITUTION AND THE SUPREME COURT 9 (L. Pollak ed. 1966) (quoting 1 T. JEFFERSON, *WRITINGS* 28 (P. Ford ed. 1892)).

<sup>35</sup> See note 3 *supra*.

<sup>36</sup> 60 U.S. (19 How.) at 529 (McLean, J., dissenting), 564 (Curtis, J., dissenting).

<sup>37</sup> *Id.* at 550 (McLean, J., dissenting).



sway a majority of the Court. Others have suggested that Taney's decision was nothing more than a political maneuver to aid President Buchanan.<sup>38</sup> Abraham Lincoln said that the opinion made it seem that "all the powers of the earth" were combining against the Negro, and "now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of a hundred men, and they scattered to a hundred different and distant places."<sup>39</sup>

The thirteenth amendment eradicated both slavery and the badges and incidents of slavery. Under its enabling clause, it gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>40</sup> As Senator Trumble of Illinois, the chief spokesman for the thirteenth amendment, has stated, its purpose was to "destroy *all* these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing."<sup>41</sup> Accordingly, to appreciate the full impact of the thirteenth (as well as the fourteenth and fifteenth) amendment, one must at least begin with *Dred Scott* to meaningfully understand the deprivations which the amendment was designed to eradicate.

Professor Bell's first chapter, with its inclusion and analysis of *Dred Scott* and other slavery cases, has provided the critical starting focus to comprehend the interrelationship between racism and the early American legal process.

### III. A SURVEY OF CONSTITUTIONAL LAW BOOKS

In recent years I have talked to hundreds of law school professors and have found that even today very few have any real knowledge of the racist reasoning, historical inaccuracies, rationale or consequences of the *Dred Scott* decision. My esteemed and liberal constitutional law professor at Yale, John Frank, had only a one-sentence reference to *Dred Scott* in his casebook. In his comments on the Taney era Professor Frank noted, "We need not pause long with the judicial work of the Taney court. . . . Foremost of the Supreme Court decisions at the time was in the case of *Dred Scott*, . . . which, for all its fascination, no longer has immediate relevance for our times."<sup>42</sup>

<sup>38</sup> L. MILLER, *supra* note 25, at 80-81; 3 C. WARREN, *supra* note 25, at 16-41.

<sup>39</sup> L. MILLER, *supra* note 25, at 79.

<sup>40</sup> Civil Rights Cases, 109 U.S. 3, 20 (1883).

<sup>41</sup> CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (emphasis added). See also the thorough history given by Mr. Justice Stewart for the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-44 (1968).

<sup>42</sup> J. FRANK, CASES AND MATERIALS ON CONSTITUTIONAL LAW 120 (1950) (emphasis added). To some extent I had reservations about mentioning Professor Frank by name. I would not want this reference to be considered a disparagement—he was one of the most sensitive professors I met on the issue of race relations. He was the leader among

Similarly, the four<sup>43</sup> volume work by Professors Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*,<sup>44</sup> has been by far the most encyclopedic and scholarly treatise in its field. Yet in their classic, they do not cite the *Dred Scott* case even once.<sup>45</sup> Nor do they include any substantial analysis of slavery law and its interrelationship to present constitutional problems.

After reviewing my law school constitutional law book and class notes, I thought that if a liberal professor such as John Frank believed *Dred Scott* "no longer ha[d] immediate relevance for our times," then certainly other renowned professors had offered generations of law students a similarly myopic view. My complaint is not unique; Professors Horowitz and Karst commented in 1969 that they "both regret having completed law school without having studied the *Dred Scott* case, surely one of the most important judicial decisions an American court ever made."<sup>46</sup> After checking with Professor Louis Pollak of Yale Law School on the major constitutional law casebooks published from 1895 through 1973, I surveyed twenty-two of the basic ones,<sup>47</sup> starting with Professor James B. Thayer's 1895 volume—the first significant casebook in the constitutional law field—and concluding with Professor Bernard Schwartz's 1973 casebook.

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American law professors in filing the significant amicus curiae brief in *Sweatt v. Painter*, 339 U.S. 629 (1950), and his work on the fourteenth amendment is still a classic. See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950). One of the most popular casebooks used today, W. LOCKHART, Y. KAMISAR & J. CHOPER, *THE AMERICAN CONSTITUTION* (1970), similarly does not discuss the bearing of *Dred Scott* on race relations at all.

<sup>43</sup> See note 9, *supra*.

<sup>44</sup> POLITICAL AND CIVIL RIGHTS, *supra* note 9.

<sup>45</sup> This conclusion is based upon an examination of the table of cases.

<sup>46</sup> H. HOROWITZ & K. KARST, *supra* note 10, at 2.

<sup>47</sup> Whenever it was available, I surveyed the first edition of these casebooks. The chart of my findings is on file at the University of Pennsylvania Law School. I am most grateful for the laborious research performed by Kenneth Henderson, a third year law student, who checked each of these volumes. We used the table of cases as our guide. Conceivably, the author may have neglected to put the cases in his table of cases, and we did not think it would warrant our thumbing through each page to catch that possible error. In chronological order, the casebooks surveyed were: J. THAYER, *CASES ON CONSTITUTIONAL LAW* (1895); J. SMITH, *CASES ON CONSTITUTIONAL LAW* (1896); C. BOYD, *CASES ON AMERICAN CONSTITUTIONAL LAW* (1898); E. MCCLAIN, *A SELECTION OF CASES ON CONSTITUTIONAL LAW* (1900); H. BARNES & B. MILNER, *SELECTED CASES IN CONSTITUTIONAL LAW* (3d ed. 1912); J. HALL, *CASES ON CONSTITUTIONAL LAW* (1913); E. WAMBAUGH, *A SELECTION OF CASES ON CONSTITUTIONAL LAW* (1914-15); D. MCGOVNEY, *CASES ON CONSTITUTIONAL LAW* (1930); W. DODD, *CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW* (2d ed. 1937); N. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* (1937); H. ROTTSCHAEFER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1948); J. FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1950); J. SHOLLEY, *CASES ON CONSTITUTIONAL LAW* (1951); P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *CONSTITUTIONAL LAW* (1954); A. MASON & W. BEANEY, *AMERICAN CONSTITUTIONAL LAW* (3d printing 1954); T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* (1956); R. MCKAY, *AN AMERICAN CONSTITUTIONAL LAW READER* (1958); E. BARRETT, P. BRUTON & J. HONNOLD, *CONSTITUTIONAL LAW* (1959); P. KAUPER, *CONSTITUTIONAL LAW* (1954); W. LOCKHART, Y. KAMISAR, J. CHOPER, *THE AMERICAN CONSTITUTION* (1964); R.E. CUSHMAN & R.F. CUSHMAN, *CASES IN CONSTITUTIONAL LAW* (1965); B. SCHWARTZ, *CONSTITUTIONAL LAW* (1972).

While there could be an endless debate over which cases before the Supreme Court from 1842 to 1896 were the most critical, I thought that for today's perspective there were at least four cases<sup>48</sup> which were extremely important in indicating the spectrum of diverse judicial views in race relations cases. They are *Prigg v. Pennsylvania*<sup>49</sup> and *Dred Scott v. Sandford*<sup>50</sup> from the slavery era, and the *Civil Rights Cases*<sup>51</sup> and *Plessy v. Ferguson*<sup>52</sup> from the early post-Reconstruction era. The casebooks were surveyed to ascertain whether these key race relations cases had been included as principal or major excerpted cases. My concern was whether the reader of the casebook would have been put on notice of the significance of these cases. I did not grant "credit" where there was merely a citation of the case with nothing more than a one or two sentence explanation, because such a brief reference is not adequate to reflect either the diversity of judicial views in the case or to provide any real insight into the case's importance for race relations. Furthermore, if an author used only a one sentence reference to a major race relations case, by implication he was saying that it was not as significant for constitutional law purposes as the other principally excerpted decisions included in the casebook. Furthermore, I felt that the exclusion of opinions such as Justice Harlan's dissents in the *Civil Rights Cases* and *Plessy v. Ferguson* was significant because it precluded the student from reading nonracist responses to what today must be admitted were the racist holdings<sup>53</sup> of the major-

<sup>48</sup> In addition to the four cases listed in the text, the following cases were surveyed: *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Hodges v. United States*, 203 U.S. 1 (1906); *James v. Bowman*, 190 U.S. 127 (1903); *Baldwin v. Franks*, 120 U.S. 678 (1887); *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *United States v. Powell*, 151 F. 648 (C.C.N.D. Ala. 1907), *aff'd per curiam*, 212 U.S. 564 (1909). We did not find any distribution of use significantly different than *Plessy* and the *Civil Rights Cases* for these cases.

<sup>49</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>50</sup> 60 U.S. (19 How.) 393 (1857).

<sup>51</sup> 109 U.S. 3 (1883).

<sup>52</sup> 163 U.S. 537 (1896).

<sup>53</sup> Loren Miller concluded that the *Plessy* majority "reduced the Fourteenth Amendment to little more than a pious goodwill resolution" and that it "had smuggled Social Darwinism into the Constitution and had armed future generations of segregationists with the cherished doctrine that they could protect racial discrimination *through law* while preserving it against change with the fiction that *law* could not function in that sphere of human affairs!" L. MILLER, *supra* note 25, at 169, 170. Miller further analyzed *Plessy* by stating that "[a]lthough the South had lost the war it had conquered constitutional law." . . . [T]he Supreme Court had revived some of the dogmas of the *Dred Scott* case." *Id.* 178 (quoting R. HARRIS, *THE QUEST FOR EQUALITY* 108 (1960)). The effects of *Plessy* were legion:

The Negro, under the Court's guardianship, was reduced to a despairing second-class citizen: voteless in the South; helpless in the face of constant and brutal aggression; indicted by all-white grand juries and convicted by all-white trial juries; denied access to places of public accommodation; represented in public office by those whose very elections were dependent upon their promise to white voters to double and redouble his [the black's] disabilities; forced to scrounge and cage for an education; segregated in every phase of his life;

ity. For in his powerful dissent in *Plessy v. Ferguson*, Justice Harlan said:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.<sup>54</sup>

Finally, he concluded, "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."<sup>55</sup>

Amazingly, Thayer dealt in great detail with *Dred Scott* in his first book, including one of the concurring opinions<sup>56</sup> and the dissents of Justices McLean and Curtis. However, only four of the twenty-two casebooks published after Thayer's included *Dred Scott* as a principal case. From 1928 to 1950 none of the authors excerpted or cited it as a principal case; from 1928 to 1972 only one author (John B. Sholley in 1951) included it in any major respect. Thayer stood alone in his inclusion of *Prigg*.<sup>57</sup>

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condemned to separate and unequal schools and public facilities of every kind; and with no place to turn for redress of his grievances except to the Courts that had approved the devices used to reduce him to his helpless and almost hopeless degradation.

*Id.* 180. Cf. A. PIFER, *THE HIGHER EDUCATION OF BLACKS IN THE UNITED STATES* 49 (1973) (emphasis added):

My second impression is that of the substantial role played by the courts in the integration of higher education. *It is true, of course, that it was the judiciary which in Plessy v. Ferguson created the great detour of "separate but equal" which threw America off course for so many long years.* Nonetheless, in the past four decades the judiciary has more than redeemed itself.

<sup>54</sup> 163 U.S. at 559.

<sup>55</sup> *Id.* at 560.

<sup>56</sup> Professor Thayer did not include Chief Justice Taney's opinion, but included Justice Nelson's concurrence because "[i]t was originally prepared, by direction of the majority, to stand as the opinion of the court." J. THAYER, *supra* note 47, at 480 n.1.

<sup>57</sup> *Prigg* is important because it arose in an earlier era—1842. In *Prigg*, the Court, through Justice Story, liberally construed the powers of Congress to extensively legislate

Not one constitutional law professor included Justice Harlan's *Civil Rights Cases* dissent until John P. Frank did so in 1950. Even more tragically, it was not until publication of John B. Sholley's casebook in 1951 that any professor included Harlan's dissent in *Plessy v. Ferguson*.

#### IV. THE DEMISE OF THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS, 1896-1946

Tragically, it was apparent by the 1880's that the "original understanding"<sup>58</sup> of the thirteenth, fourteenth and fifteenth amendments was being steadily emasculated by a hostile Supreme Court.<sup>59</sup>

The last rung of hope for blacks dropped out in 1896 with the federal birth of the separate but [un]equal doctrine. In *Plessy v. Ferguson*,<sup>60</sup> the Supreme Court upheld the constitutional right of a state to enact a statute providing for separate railway carriages for the white and colored races. The Court impliedly

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for the capture of fugitive slaves, even though there was no enabling clause in article IV, § 2. Conversely, the Supreme Court later construed the thirteenth and fourteenth amendments as narrowly as possible, strictly limiting the powers of Congress despite the presence of enabling clauses in the two amendments. Justice Harlan put *Prigg* in this perspective through his dissents in the *Civil Rights Cases* and *Plessy v. Ferguson*. In the *Civil Rights Cases*, while speaking of *Prigg*, he noted:

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on claim was implied from the recognition of that right in the national Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or inference. . . . That doctrine ought not now to be abandoned when the inquiry is not as to an implied power to protect the master's rights, but what may Congress, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.

109 U.S. at 33-34.

<sup>58</sup> See *Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs*, 347 F. Supp. 268, 291-93 (E.D. Pa. 1972) (Higginbotham, J.); H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964). See also 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 1083-1118 (1953); R. HARRIS, *THE QUEST FOR EQUALITY* (1960); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1965); B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* (1914); J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19 (1938); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949); Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421; Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (pts. 1-2), 47 YALE L.J. 371 (1938), 48 YALE L.J. 171 (1938); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pts. 1-2), 1950 WIS. L. REV. 479, 610.

<sup>59</sup> See BELL, *supra* note 6, at 195-208; L. MILLER, *supra* note 25; Bell, *Black Faith in a Racist Land*, 20 J. PUB. L. 409 (1971); Franklin, *History of Racial Segregation in the United States*, 304 ANNALS 1 (1956).

<sup>60</sup> 163 U.S. 537 (1896).

approved the right of a state to establish separate schools and other public facilities for blacks and whites, saying:

[W]e think the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . . .<sup>61</sup>

Think of the type of nation we would now have if in 1896 our leaders had really followed the message of Justice Harlan that "the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."<sup>62</sup>

If this message had been implemented, subtle or blatant racism would not be one of the underlying issues in the current political campaigns. There would be no problems of busing today; nor would there be the extensive racial ghettos that now exist in the inner cities of our nation. The striking racial gaps between black and white economic, health and educational attainment would be either nonexistent or significantly diminished.

But we have these tragic disparities today because moral leadership and the legal process did not support the concept of an open society. Blacks were abandoned by the 1877 Hayes-Tilden Compromise<sup>63</sup> and the 1896 *Plessy v. Ferguson* capitulation. For decades no substantial moral leadership was provided in this field by the White House, by the courts, by the schools, by the Congresses, or by the state governments, and often not even by the churches.

The catastrophic backlash in education that resulted from the *Plessy v. Ferguson* doctrine seems almost unbelievable.<sup>64</sup> As an example, in *Berea College v. Kentucky*,<sup>65</sup> the Supreme Court in 1908 upheld the validity of a 1904 Kentucky statute which prohibited a college from teaching white and Negro pupils in the same institution. Berea College was established in the Kentucky mountains in 1854 by a small band of Christians who began their charter with the words, "God hath made of one blood all nations that dwell upon the face of the earth."<sup>66</sup> After the Civil War it admitted students without racial discrimination, and by 1904 it had 174 Negro and 753 white students. It was a private institu-

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<sup>61</sup> 163 U.S. at 548.

<sup>62</sup> *Id.* at 560.

<sup>63</sup> See R. LOGAN, *supra* note 1, at 15-47 (1965); A. PIFER, *supra* note 53, at 11; C.V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d rev. ed. 1966).

<sup>64</sup> See L. MILLER, *supra* note 25, at 165-82; A. PIFER, *supra* note 53, at 13-23.

<sup>65</sup> 211 U.S. 45 (1908).

<sup>66</sup> L. MILLER, *supra* note 25, at 197.

tion supported by those who subscribed to its religious tenets, and it neither sought nor received any state aid or assistance. Yet the Supreme Court held that a state could prohibit any private institution from promoting the cause of Christ through integrated education. What a tragic ruling! A nation loudly pronounces its faith in freedom of religion, yet sanctions a state's denial of the day to day application of religious concepts if practiced in an integrated religious setting. Justice Harlan wrote another eloquent dissent in *Berea College*, and, tragically, Justice Holmes, the darling of the legal liberals, concurred in the majority's repressive opinion.

Professor Bell, in commenting on this period, has said:

And as the gains made by blacks—political, legal, and social—were erased in the 1870's, the Supreme Court and the lower courts confirmed in their decisions what blacks had feared, that the citizenship they had been granted, which indeed they believed they had earned through the blood of thousands of blacks who had died fighting on the Union side during the War, was citizenship in name only. . . .

In the process, blacks were damaged. But with faith and grace that some of us still sing about, that Amazing Grace, we survived.<sup>67</sup>

During this era of 1896 to 1946, the Constitution was not viable in striking down the reign of racism. The legislative, executive and judicial branches seemed almost totally impotent in effecting meaningful change. From the presidency of Grover Cleveland through that of Herbert Hoover, presidents were either patently hostile or generally unsympathetic to the muted and cautious requests by blacks for some slight improvement of their lot. During this era, blacks were restricted to the most menial jobs. With only the rarest of exceptions the professional, managerial, secretarial, and "white collar" jobs were certainly unreachable for even the most talented and competent blacks. Even the false rumor that a black had been present at an official White House function was sufficient to drive President Cleveland to frenzy, and thus he responded: "It so happens that I have never in my official position, either when sleeping or waking, alive or dead, on my head or my heels, dined, lunched, supped, or invited to a wedding reception, any colored man, woman, or child."<sup>68</sup>

<sup>67</sup> Bell, *supra* note 59, at 414.

<sup>68</sup> G. SINKLER, *supra* note 27, at 270.

When a most moderate colored leader, Booker T. Washington, informally had lunch with President Theodore Roosevelt:

The *Memphis Scimitar* said, "The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White House." Senator Benjamin Tillman of South Carolina said, "Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places." Georgia's governor was sure that "no Southerner can respect any white man who would eat with a Negro."

The ultimate obscenity was sponsored by Governor James K. Vardaman of Mississippi, in his newspaper: "It is said that men follow the bent of their geniuses, and that prenatal influences are often potent in shaping thoughts and ideas in after life. Probably old lady Roosevelt, during the period of gestation, was frightened by a dog, and that fact may account for the qualities of the male pup that are so prominent in Teddy. I would not do either an injustice, but am disposed to apologize to the dog for mentioning it." There was more much more, in the same scurrilous vein by newspapers, officeholders and southern politicians.<sup>69</sup>

With such responses to even an informal luncheon with Booker T. Washington, it appeared that most occupants of the White House did not accept the philosophy of John F. Kennedy that "There is more to the Presidency than just letting things drift . . . ." <sup>70</sup>

Apparently, Woodrow Wilson had no qualms about the plight of blacks. A black newspaper, *The New York Age*, warned that Wilson, "both by inheritance and absorption . . . has most of the prejudices of the narrowest type of southern white people against the Negro." Princeton University, of which Woodrow Wilson was President from 1900 to 1910, was the only major northern school that excluded Negro students. Moreover, as governor of New Jersey from 1911 to 1912, his "progressivism" did not embrace the Negro. Wilson's "New Freedom" had been "'all for the white man and little for the Negro.' Wilson had not

<sup>69</sup> *Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs*, 347 F. Supp. 268, 279 & n.15 (quoting L. MILLER, *supra* note 25, at 206-07).

<sup>70</sup> Edelman, *Southern School Desegregation, 1954-1973*, 407 ANNALS 32, 35 & n.12 (quoting R. SARRATT, *THE ORDEAL OF DESEGREGATION* 52 (1966)).



visited 'any colored school, church, or gathering of colored people of any nature whatever.'"<sup>71</sup>

During Wilson's administration, there was a steady "expansion of segregation in the federal department buildings in Washington, a policy which Taft had begun."<sup>72</sup>

The Congress was no better. It "had done nothing to protect civil rights during Republican administrations and did nothing under Wilson."<sup>73</sup> "Neither Harding nor Coolidge had restored Negro patronage to pre-Wilson levels, and in 1928 Hoover bypassed the regular black-and-tan organizations to cultivate white support in the South."<sup>74</sup> Government offices and cafeterias remained segregated; the War Department segregated Negro Gold Star mothers who were traveling to their sons' graves in France; Hoover ignored race problems in his messages to Congress. He made "'fewer first class appointments of Negroes to office than any President since Andrew Johnson.'"<sup>75</sup>

On December 5, 1946, by executive order, President Truman appointed the first President's Committee on Civil Rights.<sup>76</sup> Its purpose was to prepare a report "with respect to the adoption or establishment, by legislation or otherwise, of more adequate and effective means and procedures for the protection of the civil rights of the people of the United States."<sup>77</sup> It is indicative of the racism and violence against blacks that existed in this country during the 1920's and 1930's that the Committee spent a portion of its report "call[ing] attention to the very substantial and steady decline in the number of lynchings which have occurred in the last two decades."<sup>78</sup> It went on to observe:

From a high point of 64 lynchings in 1921, the figure fell during the 1920's to a low of 10 in 1928. During the decade of the 1930's the total climbed again to a high of 28 in 1933, although the decade ended with a low of 3 in 1939. Since 1940, the annual figure has never exceeded 6; on the other hand, there has not yet been a year in which America has been completely free of the crime of lynching. The Committee believes that the striking improvement in the record is a thing to be devoutly thankful for; but it also believes that a single lynching is one too many!<sup>79</sup>

<sup>71</sup> R. LOGAN, *supra* note 1, at 361 (quoting A. WALTERS, *MY LIFE AND WORK* 257 (1917)).

<sup>72</sup> *Id.* 361.

<sup>73</sup> *Id.* 363.

<sup>74</sup> G. TINDALL, *THE EMERGENCE OF THE NEW SOUTH 1913-1945*, at 542 (1967).

<sup>75</sup> *Id.* (quoting Du Bois, *Hoover*, 29 *THE CRISIS* 362 (1932)).

<sup>76</sup> Exec. Order No. 9808, 3 C.F.R. 590 (1943-1948 Comp.).

<sup>77</sup> *Id.*

<sup>78</sup> PRESIDENT'S COMM. ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* 20 (1947).

<sup>79</sup> *Id.*

Americans have been taught that equality comes through the route of education. The disparity of income as late as the 1940's between blacks and whites who had the same academic credentials is startling, however.

Nor can the disparity be blamed entirely on differences in education and training. The 1940 census reveals that the median annual income of Negro high school graduates was only \$775 as compared with \$1,454 for the white high school graduate; that the median Negro college graduate received \$1,074 while his white counterpart was earning \$2,046; that while 23.3 percent of white high school graduates had wage or salary incomes over \$2,000, but four percent of Negro graduates achieved that level.<sup>80</sup>

Since proportionately far fewer blacks finished high schools or college because of the pervasive discriminatory patterns in American life, these disparities (approximately fifty percent less income for the same educational attainment) do not indicate the actual magnitude of racial deprivation in this era. Even more devastating than the income disparity was the demoralizing and demotivating impact this discrimination had on young blacks. Seeing these inequities, many felt that it was futile to try for academic excellence, since brain power and tenacity would not produce their just rewards.<sup>81</sup>

During this period the American Bar Association, while righteous about the attempted "packing"<sup>82</sup> of the Supreme Court in 1937, did not have enough institutional morality to publicly oppose discrimination by the state bar associations which deprived blacks of membership. In fact, the record indicates that it was not until the mid-1940's that even one black (of course, a super-black) was admitted to the American Bar Association.<sup>83</sup>

<sup>80</sup> *Id.* 58.

<sup>81</sup> See generally G. MYRDAL, *supra* note 4.

<sup>82</sup> For a collection of articles, see generally 23 A.B.A.J. 233-490 (1937). See *id.* 268, 354-57 (editorials). In the editorials, it is noted that "[t]he part which the American Bar Association has played in the democratic defense of 'the Gibraltar of American liberties' has given an added prestige and significance to actions taken by the Association . . ." *Id.* 356. Yet as one of the guardians of the Gibraltar of American liberties, the A.B.A. did not have the strength or the moral fortitude to take an institutional position against racism within its own organization.

<sup>83</sup> Similar discrimination against Negro lawyers by the American Bar Association has led to the formation of the colored National Bar Association. In 1943 the American Bar Association elected a Negro, Justice James S. Watson of New York, the first to be admitted since 1912 when three Negroes, who were not known to be Negroes, were accepted. The same year the Federal Bar Association of New York, New Jersey, and Connecticut opened its membership to Negro attorneys and condemned the 'undemocratic attitude and policy' of the American Bar Association for discriminating against Negro members. In the actual practice of law so great are the limitations in the South that the majority of Negro lawyers have settled in the North.

M. DAVIE, *NEGROES IN AMERICAN SOCIETY* 118 (1949).

After analyzing the plight of black lawyers within his own profession, Judge Raymond Pace Alexander spoke in 1941<sup>84</sup> in behalf of the necessity of a black bar association—the National Bar Association—as follows:

Just so long as we are compelled to recognize racial attitudes in America, and the positive refusal to admit the Negro lawyer to membership in the Bar Associations of the South or even to permit them to use the libraries, just so long as the Negro lawyer is restricted in his membership in local Bar Associations in the North, and particularly, so long as the American Bar Association for all practical purposes refuses to admit Negroes to membership, then so long must there be an organization such as the National Bar Association. Certainly all of us shall welcome the day when racial animosities and class lines shall be so obliterated that separate Bar Associations, other separate professional associations as well as separate schools will be anachronisms.<sup>85</sup>

This era of 1896 to 1946 was perhaps described most accurately by Tuskegee Institute's president, Robert R. Moton, in 1929, when he stated "From the beginning . . . the attempt has been made to fix permanently the status of the Negro and so remove the subject from public discussion and agitation. . . . But it refused to stay fixed."<sup>86</sup> President Hoover's Committee on Social Trends reported in 1930 "[t]he relationship of white[s] and Negroes will raise continuing problems."<sup>87</sup>

In response to these continuing problems and the pressure brought to bear by A. Phillip Randolph and others through the March on Washington movement, President Roosevelt issued Executive Order 8802 in June, 1941.<sup>88</sup> The order provided that "there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color or national origin . . . ."<sup>89</sup> This weak executive order rested solely on conciliation, without real enforcement power to assure mean-

<sup>84</sup> When Judge Alexander wrote in 1941, of course he was not a judge, for there were no judges of record in any base line court in Pennsylvania and probably not even five such black judges in the nation. For a description of Judge Alexander's experiences at the Bar, see Alexander, *Blacks and the Law*, 43 N.Y.S.B.J. 15 (1971), reprinted in 43 Pa. B. Ass'n Q. 61 (1971).

<sup>85</sup> Alexander, *The National Bar Association—Its Aims and Purposes*, 1 NAT'L B.J. 2 (1941). See also *Reflections*, 1 BALSA REPORTS 8 (1973) (reprint of excerpts from Judge Alexander's speech).

<sup>86</sup> G. TINDALL, *supra* note 74, at 540 (quoting R. MOTON, *WHAT THE NEGRO THINKS* 48-49 (1929)).

<sup>87</sup> *Id.* (quoting 1 PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS, *RECENT SOCIAL TRENDS IN THE UNITED STATES* xli (1933)).

<sup>88</sup> 3 C.F.R. 957 (1938-1943 Comp.). For a history of this executive order, see P. FONER, *ORGANIZED LABOR AND THE BLACK WORKER, 1619-1973*, ch. 17 (1974); R. WEAVER, *NEGRO LABOR, A NATIONAL PROBLEM* (1946).

<sup>89</sup> Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Comp.).

ingful changes when hostile discriminatory patterns were encountered.<sup>90</sup> Yet in response to Executive Order 8802 and a suggestion by Dr. Studebaker of the Office of Education in 1944 that the colleges and universities of the South should open their doors for the matriculation of Negro students, Senator Theodore Bilbo, a lawyer, gave his "full and complete endorsement" to the Jackson (Mississippi) Daily News' editorial comment that the Washington officials should "go straight to hell." He emphasized that:

[The editor] is right when he says that the South won't do it and that not in this generation and never in the future while Anglo-Saxon blood flows in our veins will the people of the South open the doors of their colleges and universities for Negro students. I repeat that [the editor] is right. We will tell our Negro-loving Yankee friends to go straight to hell.<sup>91</sup>

He concluded by stressing that:

History clearly shows that the white race is the custodian of the gospel of Jesus Christ and that the white man is entrusted with the spreading of that gospel.

. . . .  
We people of the South must draw the color line tighter and tighter, and any white man or woman who dares to cross that color line should be promptly and forever ostracized. No compromise on this great question should be tolerated, no matter who the guilty parties are, whether in the church, in public office, or in the private walks of life. Ostracize them if they cross the color line and treat them as a Negro or as his equal should be treated. . . .

. . . .  
[I]t is imperative that we face squarely and frankly the conditions which confront us. We must not sit idly by, but we must ever be on guard to protect the southern ideals, customs, and traditions that we love and

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<sup>90</sup> See M. ROSS, *ALL MANNER OF MEN* 21 (1948):

The Southern branch of the President's official family resented his FEPC [Fair Employment Practice Committee]. Most of the policy makers in the big war agencies were either apathetic or considered FEPC a necessary nuisance. Some favored it for political reasons, some out of conviction. Nearly everyone hoped that its activities could be kept harmlessly discreet. Because white people do not generally try to follow what is in the minds of Negroes, official Washington fell far short of realizing the urgencies behind Negro support of FEPC.

While of course the wartime executive order and Fair Employment Practice Commission had some success stories, Ross's analysis of a case involving the Western Cartridge Company illustrates the agency's impotence when encountering strenuous opposition. *Id.* 49-66.

<sup>91</sup> *The Development of Segregationist Thought* 139 (I. Newby ed. 1968) (quoting 90 CONG. REC. A1799 (1944)).

believe in so firmly and completely. There are some issues that we may differ upon, but on racial integrity, white supremacy, and love for the Southland we will stand together until we pass on to another world.<sup>92</sup>

Thus, during World War II, while thousands of black soldiers were dying on battlefields throughout the world to seek victory for democracy against Hitler's Aryanism, the mold of racism was still firm at home, to such an extent that neither civil rights legislation nor anti-lynching laws could be enacted.

Other critics of racial equality spoke in voices less shrill than Bilbo's, but their hatred and racism was just as intense. Instead of interlinking, as did Bilbo, the gospel of Jesus Christ with white supremacy, his successors used more sophisticated terms such as "interposition," and "nullification" and demonstrated a willingness to sit in school house doors forever to assure segregation forever.<sup>93</sup>

I quote Senator Bilbo with a full appreciation that there were others who vehemently disagreed with his racist views. The significance of Bilbo's comments is that they exemplify the separatist rationale which was sanctioned under *Plessy v. Ferguson*—thus a rationale which Justice Harlan had opposed in his dissent. Yet, tragically, the casebooks read by generations of law students did not present the other view, as embodied in Justice Harlan's forceful dissents. Again, the exclusion of such powerful dissents from casebooks indicates what may have been the withholding of significant ideas from generations of lawyers who would later become business leaders, union lawyers, presidents, senators, congressmen, and public officials throughout the land. Perhaps if the analysis which Professor Bell so wisely included had been part of the constitutional law teaching from 1896 to the 1940's, at least some lawyers would have been more leery of the racist views they proposed.

Of course, since 1944 there have been many extraordinary advances to eradicate some of the injustices sanctioned by the earlier legal process. The battleground in the courts has shifted from a defense or sanction of blatant racism to defining whether there are constitutionally permissible methods of eradicating the consequences of past racism.<sup>94</sup> Many institutions which discrimi-

<sup>92</sup> *Id.* 143-145 (quoting 90 CONG. REC. A1801 (1944)).

<sup>93</sup> See generally POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, *supra* note 9, at 1264-68 nn.1-5.

<sup>94</sup> There is a longstanding debate as to when the judicial freeze of black rights started to thaw. Some might claim it was early as *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), but that opinion must be construed as at least an implied reaffirmation of the "separate but equal" doctrine. Others might suggest that from an impact standpoint, the thaw started in *Morgan v. Virginia*, 328 U.S. 373 (1946), where the Court held that under the commerce clause states had no power to impose segregation affecting interstate passengers. But I place the first beacon of hope, though even then a dim one, with

nated blatantly in the past, such as the American Bar Association,<sup>95</sup> have now taken positions against racism. But still, as the Civil Rights Commission has observed, "The final chapter in the struggle for equality has yet to be written."<sup>96</sup> These advances have come about by reason of the tenacious efforts of a relatively few lawyers (black and white) and an increasingly enlightened court, but the burdens and obstacles have been extraordinary. Yet it is undebatable that the progress would have been far greater if lawyers, with their extraordinary overrepresentation in policy-making positions, had as a group been more committed to equal justice for all.

### V. CONTENTS OF BELL'S BOOK

In addition to Part I, *The Development of Racism and American Law*, which is basically a historical analysis during the time of slavery, Professor Bell covers five major areas which he categorizes as the rights of citizenship, the right to education, the right to housing, the right to employment, and the right to justice. Each one is subdivided by chapters which cover current racial civil rights litigation. As to rights of citizenship, he has specific chapters on the right to vote, the right of access to public facilities, the right to interracial sex and marriage, the right to protest, and the right to military service and conscientious objector status. Bell thoroughly covers the problems of discrimination in education, both southern and northern. Under rights to

Smith v. Allwright, 321 U.S. 649 (1944), because the Court there overruled the wretched doctrine of *Grovey v. Townsend*, 295 U.S. 45 (1935). Some of the basic cases in the post-1944 era are:

(1) *Voting*. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (implementation of 1965 voting rights act); Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963) (one man-one vote); Baker v. Carr, 369 U.S. 186 (1962).

(2) *Education*. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Brown v. Board of Education, 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

(3) *Housing*. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Shelley v. Kraemer, 334 U.S. 1 (1948).

(4) *Employment*. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

(5) *Public accommodations*. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

(6) *Prohibition of racial violence*. Griffin v. Breckenridge, 403 U.S. 88 (1971); United States v. Johnson, 390 U.S. 563 (1968); Pierson v. Ray, 386 U.S. 547 (1967).

(7) In addition to the role exerted by the Supreme Court, the passage of the Civil Rights Acts of 1957, 1964, 1965, and 1968, 42 U.S.C. §§ 1971, 1974, 1975, 1993, 1995, 2000, 3601-19, 3631 (1970) was of profound significance.

<sup>95</sup> Harrison Tweed, Bernard Segal and Whitney North Seymour have been particularly effective voices for a more liberal attitude within the organized bar and the A.B.A. For a perspective on the organized bar at its best, although involving a relatively few lawyers, see LAWYERS COMM. FOR CIVIL RIGHTS UNDER THE LAW, TEN YEAR REPORT (1973).

<sup>96</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, FREEDOM TO THE FREE, CENTURY OF EMANCIPATION, 1863-1963, at 207 (1963).

housing, he has separate chapters on housing remedies for individual blacks and housing remedies for blacks as a class. With regard to the right of employment, he has separate chapters on federal labor law and racial discrimination, and employment discrimination and black self-help efforts; for the right to justice he has chapters on remedies for summary punishment, and jury discrimination.

Most of the major civil rights casebooks have been designed as first generation *Brown v. Board of Education*<sup>97</sup> casebooks. That is, in their first editions the authors focused primarily on the appellate litigation of the decade before the 1954 *Brown* decision and on the litigation up to 1964. Thus, as an example, in the voting rights area most authors have been inclined to use as principal cases the primary election cases<sup>98</sup> or poll tax cases<sup>99</sup> which preceded the adoption of the twenty-fourth amendment or the 1965 Civil Rights Act.<sup>100</sup> When those textbooks were written, these cases were essential for critical understanding of the state of the law at the time. Today, however, effective advocacy requires a mastery of the cases following the 1964 and 1968 Civil Rights Acts and the post-twenty-fourth amendment cases. As a second generation book, Professor Bell's spends only a few pages on the white primary and poll tax cases; most of the principal cases used by him have been decided within the last ten years.

Thus the chapters on voting are clearly adequate for either the practitioner or the law school professor who seeks insights on the current status of racial voting rights precedents and laws. But if one wanted a fuller historical analysis with a collection of earlier cases in the voting rights field, Professor Bell's book would not be sufficient; by reason of its one volume size, it does not have a sufficient panoply of those historical cases.

By his selection of cases concerning the right to education, Professor Bell demonstrates that his book is clearly a second generation *Brown v. Board of Education* textbook. He has focused most directly on some of today's most pressing and intricate problems, such as post-*Brown* northern school litigation and de facto versus de jure segregation, and he has included a thoughtful, balanced chapter on alternatives to integrated schools.

For law school professors, Bell has included seventeen racism hypotheticals in his text. These give students and professor a format for arguing a relevant problem; the class could be divided into law firms and each firm assigned to represent a particular party, and some students could act as judges.

<sup>97</sup> 347 U.S. 483 (1954).

<sup>98</sup> *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>99</sup> E.g., *Breedlove v. Shuttles*, 302 U.S. 277 (1937). See also *Harman v. Forssenius*, 380 U.S. 528 (1965) (post-twenty-fourth amendment).

<sup>100</sup> 42 U.S.C. § 1971 (1970).

While I have spoken of Professor Bell's book primarily from a professorial standpoint, it is also a handy and invaluable reference book for the practicing lawyer in any civil rights litigation (whether he or she is taking a "pro" or an "anti" position). With this book in one's bag when entering court, an advocate has a guidepost to the criss-crossing currents in civil rights decisions.

While Professor Bell is entitled to high accolades for having written this superb book, his greatest challenge lies in the future. To keep it viable, he will have the awesome task of no less than biennially preparing detailed supplements. Since his book went to the printer, for example, the United States Supreme Court decided *Keyes v. School District No. 1, Denver, Colorado*,<sup>101</sup> "the first school desegregation case to reach [the] Court which involves a major city outside the South,"<sup>102</sup> and divided four to four in *Bradley v. City of Richmond*.<sup>103</sup> *Bradley* was the first major case raising the issue whether a district court may compel the joinder of a unitary school system with two other unitary school districts in order to achieve a greater degree of integration and racial balance.

Even now before the United States Supreme Court there are at least two significant cases<sup>104</sup> which may indicate whether the thrust of the Warren Court has reached a plateau or whether the Supreme Court recognizes that much still has to be done. The challenge of this decade is whether the Constitution, which has been flexible enough in the past to accommodate the aspirations of labor,<sup>105</sup> the aged,<sup>106</sup> investors,<sup>107</sup> minors,<sup>108</sup> farmers,<sup>109</sup> consumers,<sup>110</sup> and women,<sup>111</sup> can have that same inherent vitality for blacks, the weak and the poor.<sup>112</sup>

<sup>101</sup> 413 U.S. 189 (1973).

<sup>102</sup> *Id.* at 217 (Powell, J., concurring in part & dissenting in part).

<sup>103</sup> 412 U.S. 92 (1973), *aff'd by an equally divided Court* 462 F.2d 1058 (4th Cir. 1972) (Justice Powell abstaining).

<sup>104</sup> *DeFunis v. Odegaard*, 94 S. Ct. 538, *granting cert.* to 82 Wash. 2d 11, 507 P.2d 1169 (1973); *Milliken v. Bradley*, 94 S. Ct. 538, *granting cert.* to 484 F.2d 215 (6th Cir. 1973).

<sup>105</sup> *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>106</sup> *Social Security Board v. Nierotko*, 327 U.S. 358 (1946); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

<sup>107</sup> *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *North American Co. v. SEC*, 327 U.S. 686 (1946).

<sup>108</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970); *In re Gault*, 387 U.S. 1 (1967).

<sup>109</sup> *Barlow v. Collins*, 397 U.S. 159 (1970); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Mulford v. Smith*, 307 U.S. 38 (1939).

<sup>110</sup> *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972); *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969).

<sup>111</sup> *Reed v. Reed*, 404 U.S. 71 (1971); *Muller v. Oregon*, 208 U.S. 412 (1908); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

<sup>112</sup> For varying conceptions of poverty, compare *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973) with *Argersinger v. Hamlin*, 407 U.S. 25, 530 (1972); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970);



## VI. THE FUTURE?

Viewing integration in college classes<sup>113</sup> or on professional football teams, there is an easy tendency to overestimate the magnitude of accomplishments achieved by blacks and other racial minorities during the last decade. However, the Sammy Davis, Jr., Wilt Chamberlain, and Justice Thurgood Marshall success stories must be placed within the broader context of the United States Commission on Civil Rights' 1973 analysis of the total spectrum:

Unemployment for blacks, Spanish surnamed Americans, and other minorities remains far higher than that of white America. For the past 15 years, the unemployment rate for nonwhites has been twice that for whites. The national rate in 1971 was 5.4 percent for white Americans but 9.9 percent for blacks and other minority individuals. . . .

The underemployment rates for minority Americans are not just a consequence of past discrimination. A look at youth employment rates refutes this argument. For white male adults, the unemployment rate is 4.0 percent; for white teenagers, it is 15.1 percent. However, the statistics for minority male adults show a rate of 7.2 percent; and for minority teenagers, a staggering 31.7 percent.

In whole industries, such as building construction, higher education, and government civil service, racial and ethnic minorities and women are consistently absent or found in disproportionate numbers in low wage, low status jobs. . . .

In 1971 the median family income for whites was \$10,672, compared with \$6,440 for non-whites and \$7,117 (1970 figure) for Spanish surnamed Americans. The discriminatory effect on minorities is obvious when one considers that 32 percent of blacks were below the

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Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963).

<sup>113</sup> By 1970 [blacks constituted] nearly 7 percent of full-time undergraduates, but this still fell considerably short of the 11 percent which blacks represent in the general population and the slightly higher percentage they constitute of the college age population. When the 1972 Office of Civil Rights data is released, however, we will find that the current figure is higher than 7 percent.

When one looks at the rate, in 1970, of participation of blacks at each level of the four-year undergraduate course, a disturbing pattern emerges. In the freshman year, blacks represented 8.3 percent of total enrollment; in the sophomore year, 6.8 percent; in the junior year, 5.4 percent; and in the senior year, less than 5 percent. This, of course, is partially attributable to an expanding annual entry of blacks into higher education and in part reflects the number of blacks now going to two-year community and junior colleges. However, it also reflects a high attrition rate.

A. PIFER, *supra* note 53, at 29-30.

low income level (poverty line) in 1971. Including Spanish surnamed Americans, Indians, and other minority groups, the figure declines slightly to 31 percent. But the number of white Americans living in poverty is only 8 percent. The receipt of public assistance is another indicator of the economic status of minority citizens. While 4 percent of the white population receives public assistance, 25 percent of the minority population receives aid. In toto, 6.4 million minority group persons rely upon public assistance in order to survive.<sup>114</sup>

The above data are more than merely interesting statistics. They symbolize the tragedy that fills millions of human lives. While the legal process cannot by its momentum alone correct all of the historical deprivations, certainly no diminution of these disparities will be possible without the interplay of a creative legal process. If we create and maintain a national commitment and concern, I am confident that during the next two or three decades many of the vestiges and consequences of racism can be eradicated in America. Blacks arrived in this country in 1619,<sup>115</sup> a year prior to the Pilgrims' arrival on the Mayflower. Maybe today's progress glows less brightly when put into a historical context of centuries of delay.

When there has been a national commitment in other aspects of American life, the nation has been able to land men on the moon, explore phenomena at the bottom of the ocean, and even build awesome and destructive military weapons. Whether we will be equally successful in the human goal of substantially eradicating racism at home is similarly contingent upon a sustained commitment to action rather than a mere retreat to rhetoric. For these tasks, lawyers and legal scholars cannot escape accountability for their action or inaction in this arena.

As much as any treatise, Professor Bell's book can play a significant role in helping the nation to answer affirmatively Frederick Douglass' inquiry so that American justice, American liberty and American civilization will be made to "include and protect alike and forever all American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the land."<sup>116</sup>

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<sup>114</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION FOR EQUAL EMPLOYMENT OPPORTUNITIES 2-3 (1973).

<sup>115</sup> "The twenty Negroes that were left at Jamestown in 1619 by the captain of a Dutch frigate were the beginning of the involuntary importation of human beings into the mainland that was not to stop until more than two hundred years later." J.H. FRANKLIN, *supra* note 4, at 71. See also C. WOODSON & C. WESLEY, *supra* note 4, at 82.

<sup>116</sup> R. LOGAN, *supra* note 1, at 9-10.

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